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No. 88-177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VECO INTERNATIONAL, INC., *et al.*,
Appellants,

v.

ALASKA PUBLIC OFFICES COMMISSION,
Appellee.

On Appeal from the Supreme Court of Alaska

OPPOSITION TO MOTION TO DISMISS

THEODORE E. FLEISCHER
GUESS & RUDD
510 L Street
Seventh Floor
Anchorage, Alaska 99501
(907) 276-5121

REX E. LEE *
CARTER G. PHILLIPS
ALAN C. GEOLOT
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Appellants

* Counsel of Record

October 12, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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VECO International, Inc., VECO, Inc., and Norcon, Inc., appellants, oppose appellee's motion to dismiss their appeal from the final judgment of the Supreme Court of Alaska. As demonstrated below, appellee in its motion to dismiss has failed to rebut appellants' showing that the Alaska Supreme Court's decision raises substantial questions as to whether the Alaska Campaign Disclosure Act is overbroad and vague in violation of the First Amendment to the United States Constitution.

1. Throughout its motion, appellee continually trivializes the constitutional doctrine of First Amendment overbreadth. Appellee characterizes appellants' overbreadth argument as merely "an attempt to avoid traditional standing requirements." Motion to Dismiss at 8. That argument ignores the foundational principle on which the overbreadth doctrine rests. It is well established that a statute which impermissibly burdens any real and sub-

stantial amount of protected speech may be challenged for overbreadth by any person who is subject to its terms, "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973), quoting *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). If affected parties were not permitted to raise overbreadth challenges under the First Amendment, then "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski*, 380 U.S. at 486.

Thus, appellee's exaggerated claims concerning appellants' actions in this case—which ignore appellee's misleading advice as to the breadth of the Act's coverage (see Jurisdictional Statement at 3-5)—are wholly irrelevant as a matter of law. See Motion to Dismiss at 12-13, 21. This appeal properly focuses on the total reach of the Alaska Act. The Alaska Campaign Disclosure Act requires *all* "groups" coming under its terms to register and to report *all* contributions and expenditures, no matter how small. Alas. Stats. §§ 15.13.040(b)(3), 15.13.050. The substantial federal question raised by appellants is whether any significant class of activity within these terms is constitutionally protected from such burdens. Thus, the issue before the Court is not, as appellee suggests, simply whether appellants' coordination of their employees' contributions poses a danger of corruption that the state may attempt to combat through required disclosure (which it does not). Rather, the Court can uphold the statute only if it concludes that even smaller and even less formal combinations of individuals than appellants are permissibly burdened by the registration and disclosure provisions of the Act. On that issue,

appellee remains largely silent because this Court's decisions do not provide an answer helpful to its position.[1]

2. Appellee seeks to convince the Court that the Alaska Act is no broader than other campaign disclosure acts that the Court has addressed. However, the Alaska Act burdens substantially more speech than any campaign disclosure statute heretofore reviewed by this Court. See Jurisdictional Statement at 10-12. Appellee does not and cannot deny that the Alaska Act, unlike the Federal Election Campaign Act ("FECA") which the Court considered in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), sets no threshold amount below which a group need not register or report its contributions and expenditures. See 2 U.S.C. §§ 431(d), 434(b)(9), 434(e), 424 U.S. at 145, 158, 160.[2] Appellee twice attempts to conceal this difference by reference to the FECA requirement that political committees keep records of all contributions received in excess of $10. Motion to Dismiss at 15-16, 25; see 2 U.S.C. § 432(c), 424 U.S. at 151. However, it was crucial to the Court's approval of the $10 recordkeeping threshold that the statute in no way authorized public disclosure of such small contributions. 424 U.S. at 82-83; see also *Buckley* v. *Valeo*, 519 F.2d 821, 864-65 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). Thus, the fact remains that this Court has never approved a campaign spending disclosure requirement that did not include a substantial monetary threshold.[3]

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[1] Appellee also does not even discuss the several holdings of the state and lower federal courts that are inconsistent with the Alaska Supreme Court's decision in this case. *See* Jurisdictional Statement at 16-18.

[2] Unless otherwise indicated, all citations are to FECA as it existed at the time the Court decided *Buckley*. *See* Jurisdictional Statement at 11 n.11.

[3] As appellee recognizes, the FECA recordkeeping provision is somewhat more analogous to the Alaska Act's requirement that groups report in the aggregate all contributions *received* not ex-

Appellee's primary argument with regard to the scope of the Alaska Act is that the Alaska Supreme Court, by limiting the Act's applicability to groups that undertake "substantial activities that are likely to directly cause more than a few votes to shift," App. to Jurisdictional Statement at 21a, excluded "the small-scale, informal activities which appellants worry are burdened by the Alaska Act." Motion to Dismiss at 19; see also *id.* at 25. However, appellee makes no effort to support this conclusory assertion. Appellee does not respond to the examples presented in the Jurisdictional Statement; appellee does not explain, for instance, why writing a letter to the editor or picketing a rally is not "substantial" action within this definition. See Jurisdictional Statement at 11-12. In fact, appellee itself dilutes any limiting effect that the "substantial action" qualification might otherwise have by arguing that a shift of "even three or four votes" can change the outcome of an election. Motion to Dismiss at 22. If small-scale political actions shift "more than a few votes," then under the Alaska court's and appellee's view, such actions are subject to regulation. But this focus on the result of the activity—the possible shifting of votes—rather than the conduct itself is a major source of the overbreadth problem. For this reason, the Alaska Supreme Court's novel and vague construction of the Act did not eliminate the overbreadth inherent in the Alaska Act.[4]

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ceeding $100. Alas. Stats. § 15.13.040(b)(2); *see also* 2 U.S.C. § 434(b)(3) (imposing similar requirement). That provision, however, is not at issue in this appeal.

[4] Appellee also points out that the Alaska Supreme Court explicitly authorized appellee to establish a monetary threshold below which registration and reporting would not be required. Motion to Dismiss at 19-20; *see* App. to Jurisdictional Statement at 21a-22a. In fact, however, appellee has imposed no such threshold. The mere possibility that the scope of the Alaska Act might be limited by discretionary regulatory action clearly does not detract from its

3. The fundamental overbreadth question before the Court, then, is whether the Alaska Act's reporting and disclosure requirements, as applied to activities beyond those approved by the Court in *Buckley*, impermissibly burden First Amendment rights. Since its seminal decision in *Buckley*, this Court has decided only one overbreadth challenge to campaign disclosure requirements. *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). In *Brown*, the Court held that Ohio could not constitutionally apply its disclosure requirements to the Socialist Workers Party because "the government interests supporting disclosure are weaker in the case of minor parties, while the threat to First Amendment values is greater." 459 U.S. at 95. This approach followed the Court's observation in *Buckley* that disclosure imposes "not insignificant burdens on individual rights, and they must be weighed carefully against the interests which [the legislature] has sought to promote by . . . legislation." 424 U.S. at 68.

Appellee contends that here the Court should not balance the government's interest in disclosure against the threat to First Amendment rights because, unlike *Brown*, this case does not involve a minor party that has historically been subject to "threats, harassment, or reprisal." Motion to Dismiss at 13-15. Appellee suggests that the alternative standard is whether the legislature could make a "reasonable" determination that disclosure requirements are appropriate. *Id.* at 25. This assertion directly contradicts the settled principle that restrictions on First Amendment rights must be narrowly tailored to serve a compelling state interest. See, *e.g.*, *Brown*, 459 U.S. at 91-92; *Buckley*, 424 U.S. at 25. In fact, nothing in the language or logic of *Brown* suggests that the Court's balancing test—the same balancing test as used

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present overbreadth. *Cf. Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 (1975) (finding statute overbroad where state had made no effort to limit it and "there is no reason to assume that the ordinance can or will be decisively narrowed").

in *Buckley*—is limited to the precise factual context there presented. Rather, this Court must consider both the importance of the government's interest and the extent of the burden on free speech in determining the permissible breadth of any campaign reporting and disclosure statute. Appellee has failed entirely to demonstrate the constitutionality of the Alaska Act under either prong of this test.

First, appellee has not shown that compelled registration and disclosure by small-scale, informal groups serve any important state interest. In contrast to its position in the state courts, appellee now focuses its state interest argument primarily on deterring corruption.[5] Appellants do not contest that the state's interest in deterring corruption is important. Merely stating the importance of this interest, however, does not establish that the interest is served by an exceptionally broad campaign disclosure statute. See Motion to Dismiss at 10-11, 12-13. Similarly, simply asserting that the Act deters corruption does not show that its relationship to this goal is "not 'more attenuated' " than that of other statutes. *Id.* at 28. In fact, it is very difficult to see how requiring a husband and wife to disclose their expenditure of 25 cents to mail a letter designed to influence "more than a few votes" would shed light on any illicit *quid pro quo*. Appellee

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[5] The Court has identified the goals that may be served by campaign reporting and disclosure requirements as: 1) helping the public to place a candidate on the political spectrum; 2) deterrence of corruption and the appearance of corruption; and 3) enforcement of other campaign laws. *Buckley*, 424 U.S. at 66-68. In its Motion to Dismiss, appellee entirely ignores the third of these interests. It does address the first interest in passing by arguing that a "token" contribution may be intended as a sign of support, and that knowledge of such contributions will help the public to predict a candidate's future performance in office. Motion to Dismiss at 24. By definition, however, a group that makes such a "token" contribution is making a public declaration of its support. Government regulation is not necessary to ensure that an interest group's "outward sign" of support reaches its public audience.

cannot seriously argue that a politician will be beholden to small groups engaging in small-scale activities such as writing letters, picketing, and the like. The question of whether the Act in all its far-reaching applications serves an anti-corruptive interest is therefore substantial.[6]

Second, appellee does not rebut appellants' showing that the Act's requirements burden small participants in the political process. Appellee argues in a footnote that the disclosure forms are "simple," and that the burden of complying is therefore "minimal." Motion to Dismiss at 26 n.2.[7] This argument, however, ignores the fact that even a simple registration and disclosure requirement can impose a significant burden on combinations of individuals who are unaccustomed to accounting in any way for their occasional incidental expenditures on political advocacy. Moreover, it inexplicably ignores the fact that the very purpose of disclosure is to facilitate investigative invasions of privacy, which may in themselves be sufficiently burdensome to discourage grassroots participation in political campaigns. This Court "ha[s] repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. This infringement is especially great in the context of an "intensely personal" politics in which "scandal-seeking reporters" closely scrutinize every detail about a candidate and his supporters. Motion to Dismiss at 23. In this atmosphere, private citizens may well hesitate to engage in campaign advocacy that will expose them to

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[6] Appellee also asserts that the Act "support[s] a thriving cottage industry of scandal-seeking reporters and political analysts." Motion to Dismiss at 23. It seems unlikely that providing fodder for muckraking journalists could be considered a substantial interest of the state, much less a compelling one.

[7] Appellee points out that it is directed by law to provide assistance in meeting the filing requirements. Alas. Stats. § 15.13.030(2). The fact that this directive was necessary undercuts appellee's claim that the multipage, detailed forms, which must be filed several times during a primary or general election campaign, are "simple."

public scrutiny and to possible threats and vindictive acts.[8] Especially in a context where "even three or four votes" can frequently change the outcome of an election, see *id.* at 22, this chilling effect is necessarily serious. Whether the state may constitutionally impose such a chill on fundamental political expression clearly raises a substantial federal question.

4. Finally, appellee attempts to persuade the Court that the vagueness question raised by appellants is insubstantial. In this regard, appellee, citing *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), erroneously asserts that appellants' standing is limited to the question of whether the Alaska Act is vague as applied to their own conduct. Motion to Dismiss at 30-31. *Parker*, however, addressed only the due process doctrine that a person may not be prosecuted under a vague criminal statute. In *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976), the Court expressly distinguished this due process vagueness doctrine from the First Amendment doctrine that the state may not burden protected speech under a statute that is vague regarding the scope of the speech that is burdened. *Id.* at 58-60. Under the latter doctrine, the Court held, parties "may raise the vagueness issue even though there is no uncertainty about the impact of the ordinances on their own rights." *Id.* at 59. Because appellants' vagueness claim arises under the First Amendment, it is not necessary for the Court to determine whether the Alaska Act is vague as applied to their conduct. Rather, the statute is invalid if its application is vague as to any "real and substantial" class of conduct.[9]

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[8] *Cf. Brown*, 459 U.S. at 97-98; *see also Buckley*, 424 U.S. at 83 (those who spend "relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences").

[9] This does not mean, of course, that the statute was in fact clear as applied to appellants' conduct. The history of this case, which appellee ignored in its motion, illustrates precisely the opposite. *See* Jurisdictional Statement at 21.

The remainder of appellee's argument consists solely of conclusory assertions that the Alaska Act is not vague. Appellee cites the dictionary for the proposition that the words "joint" and "act" have common meanings, and therefore concludes that the term "acting jointly" gives fair notice as to its coverage. Motion to Dismiss at 32. This argument, however, ignores the question of what type or amount of coordination is necessary to render an action "joint." Finally, appellee simply quotes the Alaska Supreme Court's conclusion that any vagueness problems in the term "substantial" action "occur only at the periphery." *Id.* at 33. Again, this argument does not address the central legal question of when activity is "likely" significantly to affect "more than a few" votes. Thus, appellee's conclusory assertions do not dispel the substantial question of vagueness raised by the Alaska Supreme Court's decision.

CONCLUSION

The Motion to Dismiss should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

THEODORE E. FLEISCHER
GUESS & RUDD
510 L Street
Seventh Floor
Anchorage, Alaska 99501
(907) 276-5121

REX E. LEE *
CARTER G. PHILLIPS
ALAN C. GEOLOT
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Appellants

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* Counsel of Record